GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-023

PATRICIA BRASWELL,
Claimant–Petitioner,

v.

GREYHOUND LINES, INC. and SRS-ITT SPECIALTY RISK SERVICES, INC.,
Employer/Carrier–Respondent.

Appeal from a Compensation Order by
The Honorable Karen R. Calmeise
AHD No. 09-519A, OWC No. 603794

Michael J. Kitzman, Esquire for Petitioner
Shawn M. Nolen, Esquire for Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY, *Administrative Appeals Judges.*

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 4, 2004, Ms. Patricia E. Braswell injured her left ankle at work. She underwent multiple surgeries to address her symptoms.

Ms. Braswell could not return to her usual duties as a bus driver. Consequently, her employer, Greyhound Lines, Inc. ("Greyhound"), provided vocational rehabilitation services.

On December 17, 2009 at a formal hearing, Ms. Braswell requested permanent total disability benefits from January 1, 2008 to the date of the hearing and continuing as well as medical

benefits. A Compensation Order issued on January 29, 2010; Ms. Braswell's requests were denied in part. An administrative law judge ("ALJ") concluded "[Ms. Braswell] is disabled from performance of her usual work duties and is entitled to ongoing temporary total benefits as well as vocational rehabilitation services. She is not entitled to permanent total disability benefits for the period subsequent to January 1, 2008." *Braswell v. Greyhound Lines, Inc.*, AHD No. 09-519, OWC No. 629144 (January 29, 2010), p. 5 ("*Braswell I*").

Almost one year later, another formal hearing was held. The claim for relief was exactly the same as the one requested at the 2009 formal hearing. The result, also, was the same as previously; the claim for permanent total disability benefits was denied.

On appeal, Ms. Braswell argues she was held to an improper evidentiary burden requiring she prove she will remain unsuccessful in her employment efforts. Ms. Braswell also disagrees with the ruling that Greyhound presented evidence of suitable, alternative employment because the Compensation Order does not state an evidentiary basis for that ruling.

Greyhound argues the February 24, 2011 Compensation Order is supported by substantial evidence and is in accordance with the law. Greyhound asserts the *Logan* standard encompasses "diligence but lack of success" which includes "overall progress towards obtaining employment." Opposition of Employer/Insurer to Application for Review of Claimant, p.5. Greyhound also asserts Ms. Braswell did not prove entitlement to a modification of the January 29, 2010 Compensation Order.

ISSUES ON APPEAL

1. Did the ALJ apply the proper standard to Ms. Braswell's requests for modification of the January 29, 2010 Compensation Order?

2. Did the ALJ properly apply the *Logan* test to Ms. Braswell's request for permanent total disability benefits?

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.[1] §32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[1] "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott, supra.*

At the December 2009 formal hearing, Ms. Braswell requested "an award under the Act of permanent total disability benefits from January 1, 2008 to the present and continuing, with interest, along with causally related medical benefits including authorization for medical treatment." *Braswell I, supra*, p.2. Her request for permanent total disability benefits was denied.

At the January 2011 formal hearing, Ms. Braswell requested "an award under the Act of permanent total disability benefits from January 1, 2008 to the present and continuing, with interest and causally related medical benefits." *Braswell v. Greyhound Lines, Inc.*, AHD No. 09-519A, OWC No. 603794 (February 24, 2011), p. 2. The requests for relief at both hearings are identical; in other words, at the January 2011 formal hearing, Ms. Braswell was requesting a modification of the January 2010 Compensation Order denying her request for permanent total disability benefits.

It is well established in this jurisdiction that once a Compensation Order has been issued, the right to an evidentiary hearing is triggered only where there has been a threshold showing that there is reason to believe that a change of conditions has occurred. *See, Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225 (D.C. 1997) ("*Anderson*")(citing *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988). Then, in order to prevail on the merits, the moving party must present sufficient evidence to prove that a change of condition has occurred in regards to "the fact or the degree of disability or the amount of compensation payable pursuant thereto." §36-324 (a)(1) of the Act; *Anderson, supra*.

The evidence supports the ALJ's findings that Ms. Braswell had been treating with Dr. David Maine on an as-needed basis since spring 2009; that in 2010, Dr. Maine found Ms. Braswell's condition was "status quo;" and that Ms. Braswell's past medical history had not changed since June 2009. *Braswell II, supra*, p.2. The ALJ went so far as to specifically find Ms. Braswell's medical condition has not changed since the prior formal hearing, *Id.* at p.4. Even though the required change is not restricted to medical conditions, in the February 24, 2011 Compensation Order, there is no analysis of the nature and extent issue in the context of *Snipes*. Without such an analysis, we are unable to ascertain whether the *Snipes* requirements have been satisfied in this case, and this matter must be remanded. [2]

Similarly, in regards to the *Logan* issue, the ALJ failed to make necessary findings of material fact required to properly analyze compliance. In *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), the D.C. Court of Appeals adopted a burden shifting device for determining the nature and extent of an injured worker's disability:

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[2] Despite an additional year of vocational rehabilitation, the ALJ concluded Ms. Braswell's work-related injury has not "rendered her unemployable or that her job search efforts will remain unsuccessful." *Braswell II, supra*, at p.4. To hold Ms. Braswell to such a standard in regards to the *Logan* issue may be error, but giving the finding in *Braswell I* that "[Ms. Braswell] has not demonstrated the requisite diligence, over a sufficient period of time, for a determination that she is unemployable," *Braswell I, supra*, at p.5, there is another reading of this portion of the Compensation Order: Ms. Braswell has not proven any change of condition warranting modification of the January 29, 2010 compensation Order.

> To summarize, once a claimant establishes a prima facie case of total disability, the employer must present sufficient evidence of suitable job availability to overcome a finding of total disability. If the employer meets that evidentiary burden, the claimant may refute the employer's presentation -- thereby sustaining a finding of total disability -- either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment. Absent either showing by the claimant, he is entitled only to a finding of partial disability.

Logan, *supra*, at 243.

Because the parties agreed Ms. Braswell was restricted from returning to her usual employment, the burden should have shifted to Greyhound to prove suitable, alternative employment. Instead, the ALJ shifted the burden to Ms. Braswell to "successfully challenge the legitimacy of Employer's contention that there is employment available, or demonstrate diligence, but lack of success, in obtaining other employment"[3] and to prove "that her work related injury has rendered her unemployable or that her job search efforts will remain unsuccessful."[4]

Given the lack of a presumption regarding the nature and extent of disability, the questions presented by the *Logan* scheme are rather straightforward: 1. Is Ms. Braswell unable to return to her usual employment? 2. If yes, has Greyhound proven suitable, alternative employment is available to Ms. Braswell? 3. If yes, has Ms. Braswell disproven the legitimacy of Greyhound's evidence of such employment or has she demonstrated diligence but lack of success in obtaining other employment? Because we cannot ascertain the ALJ's answers to these questions and the evidentiary basis for such answers, the Compensation Order does not set forth the necessary findings of fact and conclusions of law required to properly analyze compliance with *Logan* and this matter must be remanded.

CONCLUSION AND ORDER

The January 29, 2011 Compensation Order is not in accordance with the law and is VACATED. This matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

May 11, 2011
DATE

[3] *Braswell II*, p. 3

[4] *Id.* at p.4.